Supreme Court, U.S.
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No. 97-114

In The

Supreme Court of the United States

October Term, 1996

A. MARIA HARRIS,

Petitioner,

vs.

ARLINGTON COUNTY, VIRGINIA, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

LISA BRYANT FOWLER
Assistant County Attorney
Office of the County Attorney
County of Arlington
2100 Clarendon Boulevard
Arlington, Virginia 22201
(703) 358-3100

SCOTT S. CAIRNS
Counsel of Record
MARCIA M. HOWARD
McGUIRE WOODS BATTLE
& BOOTHE, LLP
One James Center
Richmond, Virginia 23219
(804) 775-1000

Attorneys for Respondents

71802 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
Lutz Appellate Services, inc.

QUESTIONS PRESENTED

Should this Court review the decision below where the District Court and the Court of Appeals followed well established precedent and the undisputed facts established that summary judgment was appropriate on Harris' claims under the Americans with Disabilities Act and the Rehabilitation Act of 1973 because:

a. The County spent four years implementing numerous accommodations to Harris' disability, but she still failed to perform at a level of competence acceptable to her supervisors;

b. Harris presented no evidence of race or disability discrimination; and

c. Virtually all of Harris' claims were barred by the statute of limitations.

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STATEMENT OF THE CASE

The Petition in this case misstates the record facts which led the courts below to dismiss Petitioner's claim because of a total lack of any competent evidence of disability discrimination. Both Petitioner's Questions Presented and her Statement of the Case proffer what she *wishes* this case had been about, rather than the case she actually presented to the District Court and to the Court of Appeals.

When Petitioner Athilla Maria Harris notified Arlington County that she needed accommodations to her multiple sclerosis ("MS"), it undertook a four year effort to provide extensive accommodations after conferring with Harris, her personal physician, the National Rehabilitation Hospital and the Virginia Department of Rehabilitative Services. Despite implementation of *all* recommended accommodations, and many others, she failed to perform the essential function of her job — applying County and federal policy to determine eligibility for welfare benefits. After extensive counseling and conferences with Harris and her counsel, she was terminated.

The District Court granted summary judgment, finding that even assuming a *prima facie* case, Harris failed to show the County's reason for termination — inability to perform — was a pretext for discrimination.

As detailed below, there is no cause for this Court to review this case specific determination, which raises no important issues of federal law and presents no conflict among the circuits.

A. The Petition Misrepresents the Record Below.

Arlington County hired Harris in November, 1989 as a Job Development Specialist in the Arlington Employment Center ("AEC") of the County's Department of Human Services

("DHS"). Within four months of her hiring, Harris' supervisors counseled her regarding problems with her performance at the AEC. These problems continued into 1992 through two changes in Harris' supervision.[1] Ultimately, Harris requested in March, 1992 that DHS management attempt to find another position for her outside the AEC due to what she described as a "very difficult" working relationship with her third supervisor, Karis Obrenski. Pl. Dep., Ap. 511-12.[2] Indeed, Harris noted in her March, 1992 calendar that she and Obrenski just did not "get along." Ap. 441.

Harris requested a transfer out of the AEC. Pl. Dep., Ap. 511-12. Ron Carlee, DHS Director, agreed that Harris and her supervisors' differences constituted "an unworkable situation," not conducive to productivity. When Harris expressed an interest in work in the Bureau of Assistance Programs which handles eligibility determinations for various forms of public assistance, including food stamps, Aid to Families and Dependent Children ("AFDC") and Medicaid, Carlee offered her the position of EW-I in the Family and Children Unit of the Eligibility Unit.

As soon as Harris decided to move to the EW-I position, the County EEO Specialist, Kitty Clark, began reviewing Harris' new job for reasonable accommodation needs. Clark and DHS management knew from Harris' tenure at AEC that she had MS and had undertaken the process to reasonably accommodate her

1. Harris devoted much of her Complaint to allegations of alleged disability discrimination, race discrimination and retaliation she claimed to have suffered during her employment at the AEC between 1991 and mid-1992. Harris did not file suit until June 22, 1995. It is also undisputed that Harris filed no charge of discrimination regarding these alleged events with the EEOC or any EEOC deferral agency. Accordingly, any discrimination claims Harris sought to pursue based on these matters were barred by Harris' failure to file a charge.

2. Where important disputes exist as to the record below, Respondents have cited to the Joint Appendix submitted to the Court of Appeals.

in the AEC position. At that time, the County had ordered an administrative physical for Harris to determine what sort of limitations her MS posed for her AEC work, and how they might be accommodated. The County consulted with Harris and her own neurologist, Dr. Michael Batipps, regarding her condition. Clark then arranged for a worksite evaluation of Harris' AEC job by the National Rehabilitation Hospital ("NRH") of Washington, D.C. NRH performed the job evaluation and reviewed the recommendations of Dr. Batipps which included providing Harris with a computer for word processing. NRH recommended the following additional accommodations: (1) adaptive writing aids (*e.g.*, pencil grips) for any writing necessary in the job after provision of the computer; (2) a sloped writing surface for greater comfort; (3) a cassette recorder to decrease Harris' need to take notes during meetings; (4) a telephone equipped with a speaker and recording option; (5) a telephone headset to eliminate the stress of holding the phone while writing or using the computer; (6) removal of extraneous objects in workplace walkways (to avoid accidents created by decreased coordination, common to MS patients); (7) enforcement of the County's handicapped parking restrictions to ensure that Harris was generally able to park close to the work building; and (8) a fan to control extremes in temperature at her workstation. Finally, to address comments by Ms. Harris that her supervisors and/or co-workers might be insensitive to her needs as a person with a disability, NRH suggested (9) sensitivity training for her co-workers.

Upon Harris' transfer to EW-I, Clark continued the County's accommodation process by determining that, because the EW-I position was similar to the AEC position, each of the accommodations implemented for Harris in the AEC should be included in her EW-I RAP. Clark also requested another worksite evaluation in October, 1992, this time by the Virginia Department of Rehabilitative Services ("VDRS"). The VDRS evaluator consulted with Harris and her supervisor to understand her

accommodation needs, and reviewed the EW-I position description, as well as the key job performance elements and standards on which her performance would be evaluated. Harris agreed that an Eligibility Worker must know how to apply public assistance policies, make decisions about eligibility or continuing eligibility, and put the results of those policy-guided decisions into various forms and reports. Pl. Dep., Ap. 519-22. An Eligibility Worker is expected to perform these duties with only general supervision: "[W]ork assignments are reviewed by immediate supervisor, but individual is expected to work independently according to standard procedures and/or instructions." Ap. 242.

The VDRS evaluator concurred with Clark's decision that accommodations implemented for Harris in the AEC position be carried over to the EW-I position. The VDRS made the following additional accommodation recommendations for the EW-I position: (10) that Harris' work station configuration allow her to have a computer, printer, policy resource manuals and other working materials in the same location; (11) that Harris' computer be equipped with WordPerfect and dBase software; (12) that necessary furniture be purchased to accommodate the optimum workstation configuration; (13) that Harris have her own copies of the public assistance program policy manuals, and that the binders be placed in holders at her workstation so that Harris could pull down one binder at a time without getting up; (14) that Harris have a stable chair with armrests; (15) that Harris have a stable work surface; (16) that provisions be made to regulate extremes in temperature, e.g., a fan and/or space heater; (17) that Harris be provided a backpack or assistance in carrying case files from one floor to another; (18) that Harris have additional adaptive writing aids (thicker pens and pencils or pencil grips); and (19) that Harris disclose her disability to co-workers to increase their sensitivity to her needs and understanding of her disability.

Clark incorporated *each* of the VDRS accommodation

recommendations into a second RAP for Harris. Clark also added an accommodation beyond those recommended by VDRS: computerization of various forms required to be filled out by Eligibility Workers to reduce the amount of handwriting required of Harris. Each of these accommodations was in place by April 20, 1993. Indeed, the only accommodation that Harris contends was not "fully" implemented was the computerization of every possible public assistance form. Cmplt., Ap. 36-39. DHS management acknowledged delays in the forms automation process and, as an interim accommodation, drastically reduced Harris' caseload. Although Eligibility Workers are normally expected to gain sufficient proficiency within five months of hiring to carry 538 cases, Harris was only expected to carry from 150 to 175 cases (25% of other workers' caseloads). Ap. 382. This accommodation was included in Harris' EW-I RAP. During this process, Kay West, Harris' supervisor, pre-selected cases to be assigned to Harris to ensure that they involved minimal complexity without excessive issues or determinations.

The County provided Harris an extensive training period for her new position. For five weeks Harris "shadowed" another Eligibility Worker to familiarize herself with the day-to-day Eligibility Worker routine. Next, Harris spent much of her time reviewing public assistance policy manuals, performing self-tests, and in other policy training (including two 5-day state training programs). Harris was not expected during this period to perform at the level of other Eligibility Workers.

West met with Harris to discuss her training and performance one month in advance of her March 1993 annual review. West informed Harris of her concern that even after six months of policy training, Harris could not easily discuss "various aspects of how a client's situation impacts the AFDC, Food Stamp and Medicaid programs in different ways." Harris acknowledged in this meeting that she did find the differing

policies among the programs "confusing" and difficult to "keep straight." Ap. 386-88. West also expressed concern that Harris was having difficulty with AFDC income calculations. In the March evaluation, West rated Harris' performance, overall, as "Needs Improvement."

In June, 1993, West again rated Harris' overall performance as "Needs Improvement." Since March, West had reviewed all actions submitted by Harris and issued a written assessment of each case. While recognizing Harris' improvement in some areas, she noted the need for improvement in the critical areas of reducing Harris' error rate in calculating AFDC grants and food stamp allotments, as well as coding of data entry documents and case documentation. West also notified Harris that she would be required at the end of her probationary period (September 1993) to make a recommendation whether Harris should be certified with permanent status in the EW-I position. She told Harris that she would base that recommendation on her improvement during the next three months. West also included specific recommendations as to how Harris could accomplish her goals.

At the end of that period, West determined that Harris' rating would be overall "Unsatisfactory" and that she would be unable to recommend Harris for certification with permanent status, which would result in her discharge.

Harris complained to her department head, Ron Carlee, that it was unfair to evaluate her at this time, despite the fact that she had been working as an EW-I for a year. Her position was that her accommodations were not complete because the forms automation component of her RAP was not completed. Cmplt., Ap. 36.

Carlee and West disagreed because in their estimation it was not necessary that all 100 public assistance forms be

available to Harris on computer to determine her suitability for the position, especially given the small percentage of these forms that Harris routinely used. However, more important to Carlee and West was the fact that Harris simply had not been able to demonstrate that she could consistently apply public assistance policy to make eligibility determination decisions. Moreover, to the extent that Harris had any success in this area, it was only with intense supervisory review and scrutiny. She had not demonstrated to West that she could work independently without an unacceptable error rate. Nevertheless, Carlee deemed it appropriate to extend her probationary period to allow her to achieve proficiency with the addition of more computerized forms.

Over the extended probationary period (between September, 1993 and February, 1994), Harris' performance did not improve in the critical areas which had concerned West for the past year. Accordingly, West recommended separation from employment. West concluded that even after nearly 18 months Harris had not demonstrated that she had mastered (or that she would master) the basic elements of AFDC, Food Stamp and Medicaid policies. Moreover, Harris had not demonstrated the ability to work independently without significant errors, even though all computer forms necessary for her pre-screened case load, which was still only 25% of other caseworkers' load, were available for Harris.

Despite the performance deficiencies detailed by West, Carlee did not immediately process Harris' termination. Instead, he extended her probationary period, and in consultation with Harris and her counsel, Carlee worked to find her another position with the County. From the spring through fall of 1994, neither Harris nor her attorney suggested that any further accommodations were necessary for Harris. Instead, they indicated that Harris was seeking alternative employment outside the County.

On September 13, 1994, Carlee wrote to Harris' counsel and told her that he had been unable to find an appropriate alternative placement for Harris in the County.[3] *Id.*

Although Harris' job performance did not improve, Carlee continued Harris' probation until February 15, 1995, when he formally recommended to County Manager Gardner that Harris be separated from her employment. Carlee determined that she simply could not satisfactorily perform the critical functions of the EW-I position despite accommodation. Gardner accepted Carlee's termination recommendation and informed Harris of her separation from County service on March 21, 1995.

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED BECAUSE THE UNDISPUTED FACTS DO NOT RAISE IMPORTANT QUESTIONS OF FEDERAL LAW WHICH REQUIRE THIS COURT'S ATTENTION.

In an attempt to create important questions of federal law and convince this Court to accept certiorari jurisdiction, Harris has misrepresented the undisputed facts and the record below. For example, without any record support, Harris characterizes her 1992 transfer from her first position as a Job Development Specialist to the EW-I position as an "accommodation" and suggests that this Court must determine whether this reassignment was a "reasonable" accommodation. She further suggests that this Court must then determine whether her status

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3. Harris herself had identified only one County placement that she deemed appropriate, a position in the County's Office for Persons with Physical Disabilities. No such position existed. Indeed, in that county office there was only one position allocated, and it was filled. *Id.*; Carlee Dep., Ap. 463-64.

as a "qualified employee" should have been determined in her original position or the position to which she was reassigned and whether she lost her protected status as a qualified employee under the ADA after being reassigned. However, a review of the facts and the decision of the District Court which was adopted by the Circuit Court below demonstrates that the issues identified by Harris were not determined below simply because the undisputed facts did not present those issues for determination.

A. The undisputed facts demonstrated that Harris' reassignment was a result of her inability to get along with her supervisor and was not an accommodation to her disability.

The record evidence demonstrated that the reason for Harris' transfer was not a request for accommodation. Harris requested a transfer from her Job Development Specialist position in the AEC as early as March, 1992[4] because she believed that the transfer was the only solution to an unworkable situation with her supervisor. In her Petition for Writ of Certiorari, Harris acknowledges that her transfer was a result of factors unrelated to disability. Petition for Writ of Certiorari at ¶ 6. Although she refers to this transfer as a "reasonable accommodation" by the County, she presented no evidence to the District Court and has presented no facts to this Court which would support such a conclusion.

Because the evidence presented did not support the conclusion that Harris ' transfer to the EW-I position was an accommodation to her disability, neither the District Court nor the Fourth Circuit considered whether that transfer was a "reasonable accommodation".

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4. Any claim regarding this transfer or its reasonableness if it was an accommodation is clearly barred by the statute of limitations.

B. The County had every reason to expect that Harris would be able to perform the essential functions of the EW-I position.

Even if the transfer had been an accommodation, the undisputed facts do not support Harris' claim. Harris alleged that she was transferred to a position which would aggravate her disability and in which she would not be able to perform. However, the record demonstrated that Harris suggested a transfer to this position and was given adequate time to evaluate its requirements.

Before making the decision to transfer to the EW-I position, Harris was allowed to shadow another EW-I for several weeks. Only after having done so did Harris accept the transfer to that position. Ap. 249, 191; Complt., Ap. 29. Harris undisputedly made the conscious decision to move to this position. Although Harris claims that the transfer was not an "appropriate reassignment", she produced no evidence to support this claim. Harris' education and background suggested that she should be able to handle the requirements of the EW-I position. Harris herself evaluated the requirements of the job at length and considered herself to be able to handle those requirements. Under those circumstances, it was reasonable for the County to assume that with training, Harris could in fact satisfy the essential functions of the position.

It was only after Harris had been in her position for a substantial amount of time that it became apparent that she would not or could not properly apply policy as required in her position. Based upon these facts, neither the District Court nor the Fourth Circuit considered whether transferring an employee to a position where she could not perform would be a "reasonable" accommodation. The undisputed facts simply did not raise such a question.

C. The record evidence did not support Harris' current claim that the County failed to accommodate her.

The District Court found that the undisputed facts established that "the County bent over backwards to accommodate Harris' disability". The undisputed evidence demonstrated that the accommodations given to Harris included: (1) conferring with her personal physician; (2) site evaluations by both NRH and VDRS; (3) purchase of a computer and printer for Harris' own use; (4) twelve weeks of computer and WordPerfect training at a cost of $15,000; (5) a cassette recorder; (6) a telephone headset; (7) a fan to circulate air which was subsequently replaced by moving Harris to an office with a separate temperature control; (8) continuous removal of all extraneous objects; (9) continued use of accessible parking; (10) a redesigned work station and furnishings at a cost of approximately $2,500; (11) redistribution of policies into smaller, lighter notebooks; (12) disability awareness training for the entire Bureau of Assistance Programs; (13) special pencil and pen grips to aid with Harris' writing; (14) permitting Harris to interview clients at her desk in order to eliminate the need for walking and carrying files; (15) computerization of social services forms; and (16) as an interim accommodation, the reduction of Harris' assigned EW case load from 538 to a range of 150 to 175. The undisputed evidence in this case further demonstrated that each and every one of these accommodations was in fact implemented.

Nonetheless, Harris has claimed that the "principal" accommodation — useable computer forms — was never implemented. Harris has provided no citations to the record to support these allegations, and in fact, cannot do so. None of the individuals who participated in Harris' accommodation process testified or even supported the allegation that the computerization of forms was the "most important accommodation". To the contrary, the undisputed evidence

demonstrated that this was never envisioned to be a "key" accommodation. Harris' own doctor did not suggest that the County computerize its forms. Neither of the two independent agencies who, with her assistance, came in and did extensive reviews of the requirements and specific duties of Harris' job recommended that the County computerize its public assistance forms. This accommodation was suggested *by the County* to further assist Harris. However, at no time was it contemplated that this be the "most important accommodation," nor was it ever contemplated that Harris could not do her job unless every single form had been placed on the computer.

Moreover, the undisputed evidence in this case demonstrated that usable computer forms were, in fact, created and made available to Harris on an ongoing basis. Harris and every other witness questioned about the computer forms agreed that the computer forms created using the PERFORM System functioned properly once they were placed on the system. The only dispute arises from Harris' unhappiness with the speed in which these forms were placed on the computer.

Harris bore the burden of establishing that a reasonable accommodation existed that would have enabled her to perform the essential functions of her job. *See Tyndall v. Nat'l Educ. Centers, Inc.*, 31 F.3d 209, 213 (4th Cir. 1994); *Pandazides v. Virginia Bd. of Educ.*, 804 F. Supp. 794, 801 (E.D. Va. 1992), *rev'd on other grds.*, 13 F.3d 823 (4th Cir. 1994). Harris failed to establish that further computerization of forms constituted such an accommodation.

In the present case, the County went beyond what was required by the ADA or Rehabilitation Act to accommodate Harris in her job. Indeed, the County even dropped quantity standards applicable to an EW-I, which it was not required to do. *Myers v. Hose*, 50 F.3d 278, n.2 (4th Cir. 1995) (An employer "cannot be expected to alter the facilities or adjust the

specifications of [Harris'] particular post"); *see also Pandazides*, 804 F. Supp. at 801-02; ADA Technical Compliance Manual, Ch. 1. Harris' after-the-fact insistence on every form being automated regardless of her need for it, its relevance to her cases, and the degree of writing needed would require defendants to undertake futile, unnecessary measures. Harris simply has identified *no* accommodation which would remedy the undisputed problem with her work: her inability to correctly and independently apply public assistance policies to determine benefit levels for benefit recipients.

D. Harris' status as a "qualified individual" with a disability was not at issue below.

In her Petition, Harris suggests that an important issue of federal law revolves around whether she lost her status as a "qualified individual" when she was transferred, or alternatively whether the determination of whether she was a "qualified employee" should have been made based on her performance in her initial position. This issue is nothing more than a red herring. The decision of the District Court which was adopted by the Fourth Circuit demonstrates that for the purposes of ruling on the County's Motion for Summary Judgment, the Court assumed that Harris had established that she was a "qualified individual". The Court granted Summary Judgment in favor of the County not because it found that Harris was not entitled to protection under the ADA or the Rehabilitation Act, but rather because despite being given every accommodation, Harris failed to perform the requirements of her position. Accordingly, the question which Harris asks this Court to answer had no bearing on the outcome of the case.

E. Based upon the undisputed facts, termination rather than reassignment was appropriate.

During her tenure as an Eligibility Worker, even with extensive reasonable accommodations and a simplified caseload

which was one-quarter of the normal caseload, Harris did not demonstrate that she could perform the most essential part of her job: applying policy correctly to determine recipients' benefits.

Harris admitted that the ability to learn, retain and correctly apply benefits policy was an essential function of the EW-I position. Indeed, it is the very reason the position exists. It was also abundantly clear that Harris did not correctly apply the policies to her simplified cases and correctly determine benefits despite having over two and one-half years to do this with a caseload equivalent to twenty-five percent of other workers. Her supervisor stated, without challenge, that it would normally take a successful new worker approximately three to six months with a caseload four times as heavy as Harris' (*not* pre-screened for simplicity) to correctly apply policy and generate work that is substantially correct. However, even with a simplified, reduced workload, Harris made the same policy errors over and over again. This problem with Harris' understanding and application of policy was repeatedly documented over Harris' two years as an EW-I.

Harris never identified any accommodation not implemented for her that would have remedied her inability to apply policy correctly without repeated errors in judgment. Accordingly, she did not establish that she should remain in her position. Moreover, even if any duty to transfer had existed in this case, that duty would only have arisen if there were an appropriate *vacant* position. *See, e.g., Gile v. United Airlines*, 95 F.3d 492 (7th Cir. 1996). Neither the County nor Harris identified any vacant positions appropriate for Harris, despite the extension of Harris' probationary period to look for such an opportunity.

II.

THE PETITION SHOULD BE DENIED BECAUSE THE OPINION OF THE FOURTH CIRCUIT DOES NOT CONFLICT WITH THE OPINIONS OF OTHER CIRCUITS.

A. There is no conflict over the duty to reassign as an accommodation, and this issue was not decided below.

Harris claims that although the Fourth Circuit has recognized in *dicta* that reassignment is a statutorily defined form of reasonable accommodation, it failed to reverse the District Courts' grant of summary judgment on that issue in this case. Neither the Fourth Circuit nor the District Court ruled on this issue simply because the facts did not require them to do so. Based on the undisputed facts, the District Court found that Harris had been reasonably accommodated in her EW-I position. Harris provided no evidence to support her contention that her desire for a reassignment was related to her disability. Instead, the overwhelming undisputed evidence established Harris' disability was reasonably accommodated in the EW-I position but that she did not grasp the basic policy necessary to properly perform the requirements of this position for reasons unrelated to her disability. Thus, no duty to accommodate this performance deficiency ever arose.

Harris attempts to avoid these facts by arguing that her 1992 transfer was a reasonable accommodation, thus the County had some greater duty to then transfer her again and again if the reasonable accommodation failed. Such a rule fails both in theory and in fact. If that were the law, an employer could never terminate a disabled employee, because each time the employee failed to satisfy the essential functions of the current position, the employer would be required to find another position which the employee might be able to fill.

However, even if that were the law, it should not apply to a situation such as this where the employee requested a transfer initially, not as a reasonable accommodation, but because she wasn't getting along with her supervisor.

Moreover, Harris' inability to perform the requirements of her position was not related to her disability. The issue of whether reassignment would have been a reasonable accommodation would only be an issue in this case if Harris' failure to perform the requirements of the EW-I position was a result of or in some way related to her disability. However, the undisputed facts established that this was not the case. Neither the Fourth Circuit nor the District Court were required to consider whether reassignment would in certain circumstances be a reasonable accommodation. Harris is asking this Court to render an advisory opinion on this issue when the facts in the case did not present that issue for determination.

B. There is no conflict regarding the "analysis of plaintiff's evidence".

Harris argues at page 15 of her Petition that the Fourth Circuit's opinion is in conflict with that of other circuits regarding the analysis of Harris' evidence. However, she fails to identify any decision with which there might be conflict. Instead, Harris simply argues that the Fourth Circuit should have been "impressed" by her evidence. Petition at p. 17. Certiorari review is not intended to seek a *de novo* review of evidence. Instead it is intended to assure consistency within the circuits and the appropriate interpretation of federal law. Granting review of Harris' claims would accomplish neither purpose.

Harris appears to suggest that the Fourth Circuit's opinion is somehow in conflict with the opinion of the Sixth Circuit's in *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173 (6th Cir. 1996). But once again she failed to identify the conflict.

III.

THE *McDONNELL-DOUGLAS* ANALYSIS WAS THE APPROPRIATE ANALYTICAL FRAMEWORK TO EVALUATE HARRIS' CLAIM.

Harris dedicates much of her Petition to arguing that the *McDonnell-Douglas* analysis was not the appropriate framework to test her claim because she provided direct evidence of discrimination. Specifically, Harris claims that the Fourth Circuit "has apparently failed to recognize that *McDonnell-Douglas* burden shifting is inappropriate in cases which plaintiff proffers direct evidence of unlawful actions".

The opinion of the Fourth Circuit in this action did not address this issue in any way, simply because Harris did not produce direct evidence of discrimination. "Direct evidence" of discrimination is evidence that the employer "announced, admitted or otherwise unmistakenly indicated that [the forbidden consideration] was a determining factor" in the employer's decision. *Cline v. Roadway Express, Inc.*, 689 F.2d 481, 485 (4th Cir. 1982) (citing *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1113 (4th Cir.), *cert. denied*, 454 U.S. 860 (1981)). It "is evidence which, if believed, *would prove* the existence of a fact . . . *without any inference* or presumptions." *O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542, 548 (4th Cir. 1995), *rev'd on other grds.*, 116 S. Ct. 1307, 64 U.S.L.W. 42, 43 (1996). In other words, direct evidence is "evidence of conduct or statements that reflect directly the alleged discriminatory attitude and bear directly on the contested employment decision". *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995).

Harris provided no such evidence to the District Court or the circuit court. Accordingly, the legal issue which Harris now asks this Court to determine, *i.e.*, whether the *McDonnell-*

Douglas analysis would be appropriate if she had presented direct evidence, was not considered by either of the lower courts. Therefore, this case presents no issue in need of resolution by this Court.

CONCLUSION

The issues presented by the Petitioner involve neither a substantial federal question nor a split among the circuits. Therefore, Respondents pray that Certiorari be denied.

Respectfully submitted,

SCOTT S. CAIRNS
Counsel of Record
MARCIA M. HOWARD
McGUIRE WOODS BATTLE
& BOOTHE, LLP
One James Center
Richmond, Virginia 23219
(804) 775-1000

LISA BRYANT FOWLER
Assistant County Attorney
Office of the County Attorney
County of Arlington
2100 Clarendon Boulevard
Arlington, Virginia 22201
(703) 358-3100

Attorneys for Respondents